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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	)	
	)	Criminal No.: 3:00-CR-400-P
v.	)	
	)	Judge Jorge A. Solis
MARTIN NEWS AGENCY, INC.; and	)	
BENNETT T. MARTIN,	)	
	)	FILED: March 21, 2001
Defendants.	)	

UNITED STATES' RESPONSE TO
DEFENDANTS' JOINT MOTION FOR
CONTINUANCE OF THE TRIAL DATE
AND MOTION TO AMEND THE SCHEDULING ORDER

Defendants Bennett T. Martin and Martin News Agency, Inc. (hereinafter "defendants") have filed a Motion to continue the trial in this matter until September 10, 2001, and to amend the scheduling order setting the trial for May 14, 2001. The defendants were indicted on October 5, 2000, and the original trial date was set for December 18, 2000. After having already gotten a five-month trial extension, the defendants now, prematurely, seek to postpone the trial for an additional four months. For the reasons stated below, the United States objects to the defendants' motion and requests that the trial begin on May 14, 2001.

I
FACTS

An indictment was returned against the defendants on October 5, 2000. The defendants were arraigned on October 25, 2000. On October 26, 2000, this Court entered its original Pretrial Scheduling Order, setting the trial date for December 18, 2000. See Attachment I, Pretrial Scheduling Order, dated October 26, 2000.

A. IMMEDIATE ACCESS TO DISCOVERY MATERIALS WAS FIRST MADE AVAILABLE TO THE DEFENDANTS AT LEAST AS EARLY AS NOVEMBER 7, 2000

On October 25, 2000, defendant Bennett T. Martin filed a Motion for Production and Discovery Pursuant to Rule 16. On November 7, 2000, the United States responded to this Rule 16 motion, describing in detail the materials to be made available to both defendants and stating that these materials "are **immediately available** to Defendant Bennett T. Martin, as well as to Defendant Martin News." United States' Response to Defendant Bennett T. Martin's Motion For Production and Discovery Pursuant to Rule 16, p. 3. (Emphasis added). The United States advised the defendants that, until the details of shipping the discovery materials to Dallas were negotiated and finalized between the parties, all the defendants needed to do in the interim to review documents in Cleveland was to contact one of the prosecutors and make arrangements to do so. Id. At no time, however, did defense counsel ever contact anyone to review documents in Cleveland.

B. THE COURT GRANTED THE DEFENDANTS' UNOPPOSED MOTION TO POSTPONE THE DATE OF THE TRIAL FROM DECEMBER 18, 2000 TO MAY 14, 2001

In its November 7, 2000, response to the defendants' Rule 16 motion, the United States advised defendants that they would be receiving at least 90 boxes of discovery materials. United States' Response to Defendant Bennett T. Martin's Motion For Production and Discovery Pursuant to Rule 16, p. 3. On November 21, 2000, the defendants filed an unopposed motion to amend the pretrial scheduling order and requested that the trial be postponed until May 14, 2001. See Defendants' Unopposed Motion to Amend Pretrial Scheduling Order. The defendants argued, among other things, that they needed additional time to review the voluminous record

that would be disclosed to them pursuant to the government's discovery obligations. Id. at p. 2. On November 27, 2000, this Court granted the defendants' unopposed motion to delay the trial and entered an Order re-setting the trial for May 14, 2001. Ironically, the pretrial schedule which the defendants now say they cannot meet was prepared by them.[1]

C. THE MINIMAL "RULES OF THE GAME" WERE NEGOTIATED AND AGREED TO BY THE PARTIES

In meeting its discovery obligations, including those imposed under Fed. R. Crim. P. 16 and Brady/Giglio, the United States agreed to ship to Dallas materials being maintained in the Antitrust Division's Cleveland Field Office, which is the office responsible for investigating and prosecuting all criminal cases in the magazine distribution industry. In its amended scheduling Order dated November 27, 2000, the Court adopted the dates agreed upon by the parties as to when certain documents were to be made available for the defendants' review in Dallas. In particular, the United States agreed to ship discoverable documents to Dallas as follows:

> (A) January 19, 2001, for all discovery material to be transported to a location in Dallas, Texas, and made available to the defense, except for material produced by the defense in response to civil investigative demands and criminal grand jury subpoenas, that were Bate-stamped and produced prior to the return of the indictment; [and]
>
> (B) February 12, 2001, for all remaining discovery pursuant to Rule 16, F.R.C.P. and Brady material to be available at a location in Dallas, Texas[.]

Order, dated November 27, 2000. The United States has complied with the amended scheduling order.

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[1] The only modifications made to it by the Court were (1) to hold the pretrial conference on May 9, 2001, rather than on the proposed date of May 2, 2001, and (2) to set the time for the trial to begin at 8:30 a.m. rather than the proposed time of 9:00 a.m.

Though defendants suggest that the "rules of the game" have hindered their review of documents, in fact the only "limitations" placed on them in reviewing, copying and using the discovery materials are found in the Agreed Protective Order entered by this Court (dated January 16, 2001) and in two letters sent to defense counsel by the United States (dated January 5 and 18, 2001).[2] Minimum control features were required because the prosecutors were physically located in Cleveland and were, essentially, giving the defendants unfettered and unsupervised access to these discovery materials, virtually all of which are covered under Fed. R. Crim. P. 6(e).[3] These minimal limitations (the defendants refer to them as "rules of the game" in their motion) are as follows: (1) the defendants are supposed to contact a paralegal in the Antitrust Division's Dallas Field Office, where the discovery materials are located, when they want to review them; (2) the defendants are supposed to give the Dallas Field Office paralegal advance notice (48 hours) to allow that person to pull the boxes requested for review; and (3) the defendants were supposed to make arrangements to bring a copy service into the Dallas Field

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[2] On January 5, 2001, prior to shipping any discovery materials to Dallas, the United States sent a letter to defense counsel advising them of the government's need: (1) to have a protective order in place limiting the use and further disclosure of discovery materials, and (2) to have some minimum control features regarding their review and copying of materials. See Attachment II, Letter of United States dated January 5, 2001. As provided in the January 5 letter, the United States filed an Unopposed Motion for a Protective Order on January 12, 2001. On January 16, 2001, this Court entered the Agreed Protective Order, limiting the disclosure and use of discovery materials produced to the defendants. On January 18, 2001, another letter was sent to defense counsel reiterating the government's position. See Attachment III, Letter of United States dated January 18, 2001.

[3] Departing from our office's general practice, there is no government person in the same room as defense counsel when they review the discovery materials. Nor is there a government person standing by a copying machine when these discovery materials are being copied by the defendants. Because the defendants have been given unfettered access to the documents after they were shipped to Dallas, the United States requested a stipulation from defense counsel providing that the defendants waive chain of custody issues related to these discovery material. The United States filed this stipulation with the Court on January 23, 2001.

Office when they want to make copies of documents.[4] The defendants admit that the Antitrust Division personnel assisting their review have been "as fully cooperative as possible as of the date of the filing of this motion." Defendants' Joint Motion for Continuance of the Trial and Motion to Amend the Scheduling Order, pp. 4-5.

D. THE UNITED STATES HAS COMPLIED WITH THE AMENDED PRETRIAL SCHEDULING ORDER PREPARED BY DEFENSE COUNSEL AND ENTERED BY THIS COURT

Pursuant to the amended pretrial order, the United States has complied in a timely manner with its discovery obligations. On January 16, 2001, the government shipped to Dallas 82 boxes of Rule 16 materials. These materials were available for review in Dallas on January 22. On February 8 and 9, 2001, the government shipped to Dallas the remaining Rule 16 documents. These 32 additional boxes were available for review in Dallas on February 12, 2001.[5] Finally, the government sent to defense counsel the following discovery materials, which also was available for review in Dallas on February 12: (1) statements discloseable to defendant Martin News pursuant to Fed. R. Crim. P. 16(a)(1)(A), including certain grand jury transcripts covered under the Jencks Act; (2) all Brady/Giglio information in the possession of the United States; and (3) a summary of the FBI's criminal records check of the defendants. An index was sent with each shipment of materials identifying the discovery materials sent and the box in which they were located. On February 20, 2001, a complete index identifying all of the discovery materials

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[4] This copying procedure was never followed. Instead, for the convenience of the defendants, it was modified to allow them to simply designate which materials they want to copy and then to arrange for a copy service of their choice to pick up the documents at the Dallas Field Office, make copies off-site, and return the originals back to the Dallas Field Office.

[5] Of these 32 boxes, 20 were Martin News records which had been subpoenaed by the government.

shipped to Dallas was sent to defense counsel. This index described all of the materials produced to the defendants and identified the boxes in which they were located.

E. DEFENSE COUNSEL HAVE NOT BEEN DILIGENT IN THEIR EFFORTS TO REVIEW THE DISCOVERY MATERIALS

The "rules of the game" provide that a log would be maintained by a paralegal in the Dallas Field Office "recording who reviewed the documents, the date of the review, and the boxes pulled for review." Attachment II, Letter dated January 5, 2001, p. 2. This log shows that the defendants have not been diligent in their review of discovery materials.

As of March 7, 2001, the day the continuance motion was filed, defense counsel had spent a grand total of **less than 13 hours** actually reviewing the discovery materials on-site. Although the discovery materials were available for their review in Dallas on January 22, 2001, defense counsel waited 10 days, until February 2, before beginning their review. Their initial review lasted only three and a half (3 1/2) hours. They then waited 18 days, until February 20, before reviewing any more documents, spending only another one and one-half (1 1/2) hours. Defense counsel next reviewed documents on February 21, spending two (2) hours before calling it a day. On February 22, defense counsel spent one and one-half (1 1/2) hours reviewing documents. On February 23, defense counsel spent one hour and 15 minutes reviewing documents. Defense counsel then took another long break, waiting 11 days, until March 6, 2001, before spending another one and one-half (1 1/2) hours reviewing documents. This is the heart of the problem here. Defendants' counsel have simply not done their job.

II
LEGAL ARGUMENT

It is well settled that a trial court has broad discretion in ruling on continuance motions, United States v. Correa-Ventura, 6 F.3d. 1070, 1074 (5th Cir. 1993), and that a reviewing court will reverse a decision to deny a continuance "only when the district court has abused its discretion and the defendant can establish that he suffered serious prejudice." United States v. Castro, 15 F.3d. 417, 423 (5th Cir. 1994), cert. denied, 513 U.S. 841 (1994). In United States v. Scott, 48 F.3d 1389, 1393 (5th Cir. 1995), the Fifth Circuit stated that "[w]hether a party complaining of inadequate preparation time was properly denied a continuance depends on (1) the amount of preparation time available, (2) whether the defendant took advantage of the time available, (3) the likelihood of prejudice from denial, (4) the availability of discovery from the prosecution, and (5) the complexity of the case." The Fifth Circuit has made it clear that each situation is evaluated on a case-by-case basis, and that the reviewing court will normally consider only the reasons for the continuance provided to the trial court. Id.

In support of their continuance motion, the defendants mistakenly rely on cases that are completely inapposite, both factually and legally. The defendants cite no case where an appellate court has held that a district court abused its discretion in refusing to delay a trial where, as here, a five-month continuance has already been granted, defendants have had access to discovery materials for such a long period of time before trial, and the government has complied with its Rule 16 and Brady/Giglio obligations more than three months before trial.

Of the 23 cases relied upon by defendants in their memorandum, an abuse of discretion for not continuing a trial was held in only eight cases. Three of these cases have no relevance to our

facts because they deal with publicity in the courtroom, two have been overruled,[6] and the facts in the remaining three cases relied on by the defendants do not even remotely resemble the facts of our case: (1) Gavino v. MacMahon, 499 F.2d 1191 (2d Cir. 1974), involved defense counsel who was forced to go to trial one month after indictment and two weeks after extensive criminal discovery in a drug case involving five defendants; (2) Everitt v. United States, 281 F. 2d 429 (5th Cir. 1960), involved defense counsel who had one day to prepare for trial in a case with multiple counts and defendants; and (3) United States v. Fessel, 531 F.2d 1275 (5th Cir. 1976), involved a pro se defendant whose previous court-appointed lawyer failed to move for a court-appointed psychiatrist, giving the defendant insufficient time to prepare his insanity defense at trial. Yet another case cited by the defendants but finding no abuse of discretion, Thomas v. Estelle, 486 F. 2d 224 (5th Cir. 1973), does not even stand for the proposition for which it is cited.

A. DEFENDANTS STILL HAVE, AND HAVE HAD, AMPLE TIME TO REVIEW DOCUMENTS AND PREPARE FOR TRIAL

The first factor articulated by the Fifth Circuit in Scott is whether the defendants have had adequate time to prepare their case for trial. Here, the answer is yes. Accordingly, their continuance motion should be denied.

1. The Defendants Still Have Plenty Of Time To Prepare For Trial

The defendants still have ample time to prepare for trial. They filed their continuance

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[6] See United States v. Miller, 500 F. 2d. 751 (5th Cir. 1974), rev'd 425 U.S. 435 (1976); United States v. Golub, 638 F.2d 185 (10th Cir. 1980), rev'd and vacated Shepard v. Maxwell, 694 F.2d 207 (10th Cir. 1982), abrogation recognized by Hopkinson v. Shillinger, 866 F.2d 1185 (10th Cir. 1989).

motion nine weeks before trial. It is, therefore, grossly premature.

The crux of the defendants' complaint is that they cannot review 77 boxes of documents within the next nine weeks. The defendants admit that they have reviewed 43 out of approximately 120 boxes of documents. Defendants' Memorandum, p. 7. Though they claim it has taken them one day to review each box of documents, this "one box per day" claim is dubious. The government's log shows that the defendants reviewed 43 boxes in less than 13 hours. At that pace, the defendants need only another 24 hours over a nine-week period to review the remaining 77 boxes. They should be able to squeeze in 24 hours of document review over a nine-week period -- and still have sufficient time to interview witnesses and pursue all leads developed therefrom.

Also, unlike all of the cases on which they rely, the defendants here have the benefit of experienced criminal defense counsel who have represented them for several years, including during the underlying grand jury investigation, the indictment phase, the arraignment phase, and throughout the entire pretrial proceedings. Michael Gibson has represented Bennett T. Martin in connection with this criminal matter since 1997; Richard Anderson has represented Martin News in connection with this criminal matter since 1999. Defendant's Memorandum, p. 8. The experience of Gibson and Anderson, with respect to this criminal matter and criminal trials in general, will ensure that the defendants are ready for their May 14 trial date.

2. The Defendants Have Had Plenty Of Time To Prepare For Trial

In arguing that they have not had sufficient time to prepare their defense, the defendants rely principally on Gavino v. MacMahon, 499 F. 2d 1191 (2d. Cir. 1974) and United States v.

Uptain, 531 F. 2d 1281 (5th Cir. 1976). Neither case supports them. In Gavino, the Second Circuit held that a district court abused its discretion in refusing to postpone a trial involving five defendants, which was being brought only two months after the indictment, one month after the arraignment, and less than two weeks after extensive criminal discovery. Gavino, 499 F.2d at 1196. The delay in Gavino was, in part, requested so that defense counsel could interview witnesses in Mexico and New Mexico. Id. Importantly, the government prosecutor consented to defense counsel's request to postpone the trial. Id. Unlike in Gavino, the trial in this matter will be held more than seven months after the indictment and arraignment, more than six months after Rule 16 documents were first made available to the defendants in Cleveland, nearly four months after Rule 16 documents were shipped to Dallas, more than three months after Brady/Giglio information was disclosed, and more than three months after Rule 16 statements were disclosed, including certain Jencks statements.

The defendants' reliance on Uptain is even more puzzling, since the Fifth Circuit held in that case that the district court did not abuse its discretion in refusing to grant a trial continuance. Uptain, 531 F. 2d at 1290. Nor do the facts in Uptain help the defendants. Uptain involved a multi-defendant case in which the defendant was indicted on April 28, arraigned on May 2, and the trial was set for May 12 -- ten days after arraignment and only five days after pretrial motions were due. Uptain, 531 F. 2d. at 1284-85. To make matters worse, Uptain's lawyer was scheduled to be in court in Jacksonville, Florida, the same day as Uptain's trial on May 12 in Montgomery, Alabama. Id. at 1284. Uptain's lawyer's repeated requests for a trial continuance or, in the alternative, for his withdrawal from the case, were rejected by the district court. Id. at 1284-86.

After cataloguing all the different types of cases that lead to requests for continuances, the Uptain Court held that Uptain had failed to meet his burden of showing that due diligence had been exercised in interviewing and subpoenaing witnesses, and that there was substantial reason to doubt that any witnesses would produce the evidence favorable to Uptain that defense counsel predicted. Id. at 1288-89. The Fifth Circuit also rejected Uptain's claim that he generally lacked preparation time, instead finding that Uptain's counsel was able to prepare pretrial motions and received favorable dispositions on most of them. Id. at 1289.

In our case, nine weeks before trial, it is entirely premature for defendants to file a motion stating that they cannot be prepared for trial. This is especially so where the defendants have had access to criminal discovery for more than seven months. Here, defense counsel do little more than shrug their shoulders and say they can review only one box of documents per day. Their situation is completely distinguishable from another case on which they mistakenly rely, United States v. Sahley, 526 F. 2d. 913, 917 n. 3 (5th Cir. 1976) (finding no abuse of discretion), where a court-appointed lawyer was given less than one month to prepare for trial, including having to travel from Alabama to New Orleans to review in one day 80,000 records held by the FBI.

B. THE DEFENDANTS HAVE NOT TAKEN ADVANTAGE OF THE TIME AVAILABLE TO THEM

The second factor articulated by the Fifth Circuit in Scott is whether the defendants have taken advantage of the time available. Here, the answer is no. Accordingly, their continuance motion should be denied.

Defense counsel alone are to blame for their claimed lack of preparation. Instead of shouldering this blame, however, they unfairly and wrongly point their finger at the government

and accuse the prosecutors of not providing timely discovery and setting oppressive "ground rules" hindering their ability to prepare. Nothing could be further from the truth.

The simple fact is that the defendants have spent less than 13 hours reviewing documents first made available to them more than seven months before trial, and which have been available for review in Dallas for nearly four months. Defense counsel have no one to blame but themselves for their non-diligent efforts. Fortunately for them, they have nine weeks to remedy their lack of effort and be ready for a May 14 trial date.

1. The Defendants Did Not Get Any Discovery Materials Pre-Indictment Because They Are Not Entitled to Them

The defendants are correct in stating the government refused to disclose to them any discovery materials pre-indictment. Of course, this is a red herring, since the defendants clearly are not entitled to any criminal discovery under the Federal Rules of Criminal Procedure prior to indictment. Nor are they entitled to any Brady/Giglio information, which, pre-indictment, would be purely speculative. The suggestion that the defendants should have been given access to materials protected under Rule 6(e) of the Federal Rules of Criminal Procedure before any indictment was returned is frivolous.

2. The Government Has Fulfilled Its Discovery Obligations and Complied With the Amended Pretrial Order

Fed. R. Crim. P. 16 sets no time frame on the disclosure of documents to be used in the government's case-in-chief or which may be material to the defense. Nonetheless, the United States has fully complied with the amended pretrial order.[7] This gave defense counsel access to

[7] Unlike the government, the defendants have not complied with the amended pretrial scheduling order. The defendants ignored this Court's Order and failed to produce reciprocal discovery to the United States as required on February 26, 2001.

discovery materials (including Rule 16 statements and Brady/Giglio information) in Dallas three to four months prior to trial. Before that, defense counsel had access to discovery materials in Cleveland, though they failed to take advantage of this opportunity. See United States' Response to Defendant Bennett T. Martin's Motion For Production and Discovery Pursuant to Rule 16, p. 3.

The defendants talk about the large number of boxes as the reason why they do not have adequate time to prepare for trial. However, 20 of these boxes consist of subpoenaed Martin News documents that were originally produced to the government by Messrs. Gibson and/or Anderson. Based on representations made by Gibson and Anderson, it is the government's understanding that defense counsel retained relevant copies of these subpoenaed documents. Surely, the defendants have had ample opportunity to review Martin News's own documents. By now, defense counsel has had ample time to nail down things that they claim are central to their defense, such as what customers Martin News sold to, Martin News's truck routes, the volume of Martin News's business, what geographic areas were serviced by Martin News, and other items raised by the defendants in their memorandum.[8] Defendant's Memorandum, pp. 3-4. If not, then they have spent their time unwisely.

It is also hard to believe that defense counsel has not interviewed relevant Martin News employees, and perhaps even some ex-employees, both prior to and after the indictment. Gibson

[8] In January, 1996, Martin News purchased PMG's Trinity News agency in Fort Worth. PMG was a co-conspirator of the defendants in the Dallas-Fort Worth area. Thus, the defendants, especially Bennett Martin, should know what customers were serviced by PMG, what truck routes PMG ran, what PMG's volume of business was, what geographic areas PMG serviced, etc.

and/or Anderson represented many of these people when they were called before the grand jury. Regardless, since February 12, 2001, more than three months before trial, defense counsel has had access, pursuant to Rule 16, to statements made to the government or grand jury by Martin News employees.

3. The Defendants Have Not Been Hindered By The "Rules of the Game"

The defendants argue that their ability to prepare their case has been hindered by the "rules of the game" set by the government. Defendant's Memorandum, p. 5. In fact, it was the defendants who prepared the amended pretrial scheduling order setting the discovery deadlines, which accompanied their motion to postpone the trial from its original date, December 8, 2000, to May 14, 2001.

The defendants can hardly complain about the Agreed Protective Order and trial stipulation regarding chain of custody issues. Not only did the defendants agree to both of these, neither one negatively affects their ability to review documents or interview witnesses. As stated, infra, the defendants also can hardly complain about the unfettered access they have been given to the criminal discovery in Dallas. Defense counsel also fail to mention that they agreed to these "ground rules." If the defendants now feel pinched by the looming trial date, this pinch is the result of their having spent less than 13 hours reviewing discovery materials that have long been available to them.

C. THE LIKELIHOOD OF PREJUDICE TO THE DEFENDANTS IS WHOLLY SPECULATIVE IN NATURE AND CAN BE FULLY REMEDIED BY THE DEFENDANTS OVER NINE WEEKS

The third factor articulated by the Fifth Circuit in Scott is whether the defendants are

likely to be prejudiced if a continuance is not granted. Here, the defendants offer nothing but speculation and conjecture. Accordingly, their continuance motion should be denied.

Because no trial has been conducted, the defendants can point to no actual prejudice that they have suffered. Instead, their prejudice claim is wholly speculative. The defendants simply assume that all of the 77 boxes of documents that have not yet been reviewed contain information material to their defense, and that between now and the next nine weeks they will be unable to process this information and use it in finding and interviewing prospective witnesses. Without any basis whatsoever, the defendants assume that documents which they have not yet reviewed, and witnesses with whom they have not yet talked, will provide them with exculpatory or impeaching evidence favorable to their defense. Their speculation falls well short of Uptain's requirement that defendants show that evidence predicted to be favorable actually exists. Uptain, 531 F. 2d at 1288-89.

It is clear that, over the next nine weeks, the defendants can remedy any harm that they speculate may befall them if the trial goes forward on May 14. Accordingly, their continuance motion should be denied.

D. THE GOVERNMENT HAS FULLY COMPLIED WITH ITS DISCOVERY OBLIGATIONS WELL IN ADVANCE OF TRIAL

The fourth factor articulated by the Fifth Circuit in Scott turns on the availability of discovery from the prosecution. Here, for the reasons already stated above, by any measure, the government has complied with its discovery obligations well in advance of trial. Unquestionably, the defendants have been given access to discovery materials well in advance of

trial, resulting in defense counsel having ample time to prepare their case for trial. Accordingly, the defendants' continuance motion should be denied.

E. THIS CASE IS NOT COMPLEX

The fifth factor articulated by the Fifth Circuit in Scott is whether the case is complex. Here, the answer is no. Accordingly, their continuance motion should be denied.

This case does not involve multiple counts, or multiple defendants with different interests, or the application of multiple criminal statutes. Here, the one-count indictment simply charges a company and its officer/owner with "conspiring to suppress and eliminate competition by allocating territories and customers for the sale and distribution of magazines and other periodicals in Dallas, Fort Worth, and the surrounding areas of Texas." Indictment, ¶ 2. This is a simple conspiracy case. The indictment charges a conspiracy "[b]eginning at least as early as August, 1990, and continuing at least through October 30, 1995, the exact dates being unknown to the grand jury." Id. The indictment states that this conspiracy "unreasonably restrained interstate trade and commerce in violation of Section 1 of the Sherman Act (15 U.S.C. § 1)." Id. To give defendants some guidance as to the nature of their illegal conduct, the indictment lists 10 acts that the defendants did in forming and carrying out the conspiracy. Id. at ¶ 4.

Though defendants suggest otherwise, there is nothing complex about the indictment or the facts of the case. The United States has charged, and will prove, a straightforward territorial and customer allocation conspiracy between two companies. The illegal agreement was formed and carried out by the defendants and resulted from meetings and discussions between the

defendants and their co-conspirators. This case presents no novel legal or factual issues.[9]

The defendants' suggestion that this case is "complex" because it involved a "five and a half" year investigation is as wrong as it is misleading. The defendants beef up their calculation by including a civil investigation involving different players, different anticompetitive behavior, and different relief than the criminal conduct with which the defendants have been charged.[10] The criminal investigation, which resulted in plea agreements with two other Dallas-Fort Worth area magazine wholesalers, has been closely monitored by defense counsel, as they represented many of the grand jury witnesses.

F. THE PUBLIC, AND THE GOVERNMENT, WILL BE PREJUDICED BY FURTHER DELAY OF THIS TRIAL

The defendants posit that the public will not be prejudiced by a trial date of September 10, 2001. Defendant's Motion, p. 9. The defendants ignore completely the fact that the public also has a right to a speedy trial. This is a case that needs to be tried. It is getting stale. The longer the trial is delayed, the more stale our case becomes to a jury, opening up the possibility for jury nullification. The charged conduct occurred, roughly, between August, 1990, and October 30, 1995. If this trial is delayed until September 10, it will be more than 11 months from the date of indictment. That is unacceptable for such a straightforward, garden variety market-allocation conspiracy.

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[9] Though defendants raise out of thin air the idea that a Bill of Particulars is needed if a continuance is not granted, no Bill of Particulars is needed here, as there is more than enough information in the indictment to ensure that the defendants are aware of the nature of the charge and to ensure, pursuant to the Double Jeopardy Clause, that the defendants are not prosecuted again for the same offense.

[10] In fact, Martin News was issued its first subpoena duces tecum on May 14, 1997, and a subsequent duces tecum on June 30, 1999.

Moreover, in unilaterally requesting a trial date of September 10, 2001, defense counsel chooses a date that conflicts with the availability of at least two key prosecution members. One of the government's prosecutors, Kimberly Smith, will be getting married in late September, making the months of September and October impossible for her to participate in the trial. Her marriage plans were set eight months ago. Since she is a key member of the staff and will run our computer technology in the courtroom, a trial date of September 10 will unduly prejudice the United States. In addition, the government's trial advisor, John Hughes, will not be available in September, due to his participation in a previously-scheduled antitrust trial in Houston, which also will take place in September.[11] Finally, defendants ignore the fact that other work and personal commitments made by the prosecution team have been scheduled around the May 14 trial date. Changing the trial date will impact these other commitments.[12]

Accordingly, if this Court believes that a trial continuance is merited, the United States respectfully requests that a status conference be held to choose a more suitable trial date than the date proposed by defendants.

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[11] It is likely that the government's second attorney, Michael Wood, will also have a trial set for September, 2001, in the Eastern District of Michigan.

[12] The defendants also ignore the fact that the entire prosecution team, which includes at least 10 people, including the prosecutors, will be coming from Cleveland, Ohio, and other parts of the country, to try this case. Hotel space, office space, and the purchase or rental of computer equipment all need to be coordinated with a concrete trial date. It is not a simple, or inexpensive, proposition to set up an office in Dallas for a three to four week period. A date certain and advance notice is imperative in handling the logistics. In making its plans, the United States has relied on, and continues to rely on, the agreed-upon trial date of May 14.

III
CONCLUSION

For the foregoing reasons, the United States respectfully requests the Court to deny defendants' motion for a continuance. In the alternative, for reasons stated above, the United States requests that a status conference be held to determine a more suitable trial date than September 10, 2001, a date unilaterally selected by the defendants which conflicts with the work and personal commitments of the government prosecutors who have handled the investigation and prosecution of this case from its inception.

Respectfully Submitted,

"/s/"

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent via Federal Express to the Office of the Clerk of Court on this 20th day of March, 2001. In addition, copies of the above-captioned pleading were served upon the defendants via regular U.S. mail on this 20th day of March 2001.

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